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CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

No. 59.

TRANSIT ADVERTISERS, INC.,

Respondent,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. EDWARD LUMBARD, JR.,
GRANVILLE WHITTLESEY, JR.,
Counsel for Respondent.

July 16, 1952.

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Statement

Respondent, Transit Advertisers, Inc., hereinafter called "Transit," brought an action in January 1949 in the United States Court for the Southern District of New York against petitioner, The New York, New Haven and Hartford Railroad Company, hereinafter called "The New Haven," for a judgment declaring that the New Haven had entered into a contract with Transit granting the latter exclusive advertising privileges on the property of The New Haven for five years commencing January 1, 1949.

The District Court held that a valid and enforceable contract had been entered into (R. 265-281). The Court of Appeals affirmed (R. 655-665).

The Facts

The facts as found by the District Court (R. 265-274) and as summarized by the Court of Appeals (R. 656-657), were substantially as follows:

Transit had held a contract for exclusive advertising privileges with The New Haven for some sixteen years prior to December 1947. At that time The New Haven advised Transit that the then existing contract would not be renewed at its termination on December 31, 1948. It thereafter requested Transit to submit a bid for a new advertising contract. Transit submitted a written offer to renew its then existing contract on the same terms except for four specified changes. A few weeks later, at the request of the railroad's executive vice president Doolan, Transit's president, Jayne, met with Doolan and two other executives of the railroad at New Haven on June 7, 1948. They discussed Transit's proposal and orally agreed on all the essential terms for the renewal of the then existing agreement for a period of five years. The meeting concluded with Doolan instructing his assistant vice president MacKay to complete and work out the details of drawing up the contract with Jayne. After the meeting Doolan signed and sent the following memorandum to the president of the railroad:

"New Haven, Conn.
June 7, 1948

Mr. H. S. Palmer:

This afternoon, Messrs. MacKay, Caley and I discussed with Mr. Jayne of Transit Advertisers, and agreed to the renewal of his contract with us on a basis of five years and at terms agreeable to all concerned.

J. F. Doolan"

MacKay subsequently directed the railroad's contract agent and its legal department to draw up the renewal contract in accordance with the agreement reached at the June 7th meeting, furnishing them in that connection a memorandum prepared by Jayne, at Doolan's suggestion covering the points agreed upon on June 7th.

On August 9, 1948, MacKay presented the draft of agreement so prepared to Jayne. After looking it over Jayne pointed out certain respects in which the draft failed to conform to the oral agreement of June 7th. Following discussion between them, Jayne and MacKay agreed on appropriate changes which were immediately made. Jayne then signed the original and one copy and gave them to MacKay to be forwarded to Doolan in New Haven.

On the morning of August 10th Doolan signed the original and the copy, forwarded by MacKay, knowing that it was the renewal contract with Transit and intending to sign it as such. Within an hour he brought both instruments to the president of the railroad stating that they were the renewal contract with Transit and that he had signed them. The president told Doolan to draw a line through his signature. He did so and filed the signed papers in his office. He then told Jayne that signing of the contract had been held up. Neither he nor any other officer of the railroad ever told Jayne that the contract had been signed.

Thereafter following further negotiations with Jayne and with one of his competitors, the railroad, early in December 1948, awarded a five year advertising contract to the latter.

Jayne did not learn until December 31, 1948 that the August 9th instrument had in fact been signed by Doolan

on August 10th. He thereupon demanded that the railroad perform. Receiving no answer this action was commenced.

Transit sued on the theory of an agreement to renew its then existing contract for five years orally arrived at on June 7, 1948. It offered the August 9th writing, signed by Doolan on August 10th, as a memorandum sufficient to take the oral agreement of June 7th out of the Statute of Frauds.

The principal issues litigated were:

1. Whether the parties orally agreed on June 7, 1948 to the essential terms for the renewal of Transit's then existing advertising contract with the New Haven.

2. Whether the writing of August 9th was a memorandum of the terms of the above oral agreement.

3. Whether this writing was effectively signed by the party to be charged.

4. Whether the applicable Statute of Frauds required delivery of the memorandum to the party relying on it.

Both the District Court (R. 272-274, 277, 278), and the Court of Appeals (R. 657-660), resolved each of these issues in favor of the plaintiff.

Petitioner's Grounds For Seeking a Writ

The petitioner states that the questions presented for review by this Court is whether the Court of Appeals was required to apply the Connecticut decisions as to the Statute of Frauds, and, if so, whether it did so.

Respondent's Position

It is the respondent's position first, that, assuming that the Court of Appeals was required to apply the Connecticut laws as to the Statute of Frauds, it clearly did so, and, second, whether it was required to apply the New York or Connecticut law, the law of both states on the issues presented is the same.

I

The decision of the Court of Appeals was in accord with the decisions and declarations of the Connecticut courts with respect to the Connecticut Statute of Frauds.

The petitioner cites four respects in which it claims the Court of Appeals did not follow the Connecticut decisions. These are:

First: Petitioner asserts that in direct conflict with the decisions of the Supreme Court of Errors of Connecticut in *Devine* v. *Warner*, 76 Conn. 229; 56 Atl. 562 (1903) and *Mitchell* v. *A. & B. Coal Co.*, 133 Conn. 693; 53 Atl. 2d 202 (1947), the Court of Appeals held that two unconnected writings may be taken together as a sufficient memorandum of an oral agreement. This misstates both the holding of the Court of Appeals in the instant case and the holdings of the Connecticut courts in the two decisions cited. In its brief in the Court of Appeals, the petitioner contended for the first time that a memorandum sufficient to satisfy the Statute of Frauds must expressly refer to the oral agreement which it purports to evidence. In discussing this contention, the Court of Appeals stated (R. 658-660):

> "The decisive question is whether the writing signed by the vice-president of the defendant is ad-

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missible proof of the oral contract. It
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satisfy the statute. *Lowther* v. *Potter*,
aff'd 6 Cir., 221 Fed. 881. But we thi
loses sight of the fact that the statute i
any such reference. It requires only tha
signed actually be such a memorandun
contract that it shows what the contra
express reference in the writing serves
that but it is not the only evidence
Surely another writing signed by the
charged which identified the writing c
such as a memorandum of the contract
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to all concerned.

Thus the record on this appeal sho
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nn. June 7, 1948

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contract with us
terms agreeable

J. F. Doolan'

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> writing, the August 9th memorandum would not have been sufficient to take the oral agreement out of the statute, when it was shown by oral proof to be but a reduction of the June 7th agreement to writing, we have no hesitation in reaching the conclusion that it may fairly be inferred, no material changes in the June 7th agreement having been proved to have been made meanwhile, that the writing of August 9th conformed to the agreement of June 7th mentioned in the memorandum of that date."

It is apparent that the Court of Appeals did not rely on the defendant's above-quoted memorandum of June 7th as a memorandum of the terms of the oral agreement but simply as some proof under the defendant's hand that an oral agreement for the renewal of the advertising contract had been made.

Neither of the Connecticut cases cited by the petitioner holds, as petitioner contends, that two unconnected writings may be taken together as a sufficient memorandum of an oral agreement. In both cases the Connecticut Supreme Court of Errors held that the particular memorandum offered was insufficient because it failed to set forth within its four corners the essential terms of any agreement. In both cases, attempts were made to cure this deficiency by offering additional memoranda—in the *Mitchell* case, a memorandum not signed by the party to be charged; in the *Devine* case, memoranda containing no contract terms whatever. In both cases, the Connecticut Supreme Court of Errors, in discussing whether a memorandum sufficient to satisfy the statute could consist of more than one piece of paper, merely stated that if the statute were to be met

in this way there must be some indication, either in the memoranda themselves or *otherwise* that the particular memoranda offered all referred to one and the same transaction.

Second: Petitioner asserts that in direct conflict with the decision of the Supreme Court of Errors in *Mitchell* v. *A. & B. Coal Co., supra,* the Court of Appeals held that a memorandum may satisfy the Statute of Frauds without reference to an oral agreement.

Petitioner correctly states that the Court of Appeals held that a memorandum may satisfy the Statute of Frauds without containing an express reference therein to the making of the oral agreement which it purports to evidence. It completely misstates the holding in the Connecticut case cited which, as indicated above, was limited to holding that the particular memorandum offered was insufficient in that it failed to set forth the essential terms of the oral agreement claimed.

Furthermore, the petitioner overlooks *Socony Vacuum Oil Co.* v. *Elion,* 126 Conn. 310, 11 Atl. 2d 5 (1940), relied on by the District Court (R. 227), in which a formal lease signed by the party to be charged and making no reference to previous oral negotiations between the parties was held a sufficient memorandum to support an action on a parol lease.

Third: Petitioner asserts that the decision of the Court of Appeals in holding that the memorandum was effectively signed by the party to be charged is in conflict with the decision of the Supreme Court of Error of Connecticut in *Schempp* v. *Beardsley,* 83 Conn. 34; 75 Atl. 141 (1910).

In so contending, the petitioner misstates the holding in the *Schempp* case. The question before the court in that case was whether a destroyed memorandum, fragments of which were produced at trial, was a sufficient memorandum. The court held that the fragments produced were not sufficient to make out the terms of the alleged agreement. It did not, as petitioner seeks to infer, hold that the destruction of the memorandum deprived it of legal effect, but merely that there was not enough of the memorandum produced to be of any use. The holding carries the clear inference that if enough of the memorandum could have been produced its attempted destruction or mutilation would have been immaterial.

Moreover, in *Handy* v. *Barclay*, 98 Conn. 290; 119 Atl. 227 (1922), referred to by the Court of Appeals in its decision (R. 660), the Supreme Court of Errors of Connecticut stated "'the moment written evidence of the contract under his hand, in whatever form, exists, the contract is taken out of the statute . . .'"

The holding of the Court of Appeals in the instant case is not in conflict with the decision in the *Schempp* case and is clearly in harmony with the principle expressed by the Connecticut court in the *Handy* case.

Fourth: Petitioner finally urges that the Court of Appeals' holding that delivery of the memorandum was unnecessary is directly in conflict with the decision of the Supreme Court of Errors of Connecticut in *Garber* v. *Goldstein*, 92 Conn. 226, 102 Atl. 605 (1917). In that case, however, the writing signed by the party sought to be charged was in fact delivered. The issue of delivery was not involved. The issue presented was whether the instru-

ment sued on was a lease or an agreement to make a lease. The trial court treated it as a lease and in instructing the jury indicated that, *as a lease,* the jury would have to find that it had been delivered. The appellate court reversed and ordered a new trial on the ground that the trial court should have also submitted to the jury whether or not the instrument was a memorandum of an oral agreement to make a lease. In this connection the appellate court held that the jury should have been instructed that the memorandum was sufficient to take the oral agreement out of the statute.

However, in *Jacobson* v. *Hendricks,* 83 Conn., 120; 75 Atl. 85 (1910) the Connecticut Supreme Court of Errors stated, as *dicta,*

> "The authorities are not altogether uniform as to the legal effect of letters, entries, and memoranda not intended for the other party, or known to him, but the great weight of authority is to the effect that such writings, if otherwise adequate, may be deemed to constitute a sufficient memorandum under the requirements of the statute, or a part of such memorandum, if more than one writing is involved. *Gibson* v. *Holland,* L. R. (1 Com. Pl.) 1; *Peabody* v. *Speyers,* 56 N. Y. 230, 237; *Drury* v. *Young,* 58 Md. 546; 42 Am. Rep. 343; *Spengler* v. *Danforth,* 65 Ill. 152."

Accordingly, assuming that the Court of Appeals was required to apply the Connecticut decisions, it is respondent's position that it clearly did so.

II

Whether the Court of Appeals should have applied the New York or Connecticut law is immaterial since there is no conflict in the law of either state on the issues involved.

In its memorandum opinion the District Court declared that while it was of the opinion that the Statute of Frauds of Connecticut was applicable, it did not appear that there would be any difference in result through the application of either statute (R. 261).

The Court of Appeals reached the same conclusion (R. 658).

It is clear from reading the decision of the District Court that in deciding each of the issues presented it examined the law of both New York and Connecticut and found no conflict (R. 277, 278, 279). It is also apparent that the Court of Appeals made a like investigation and reached the same conclusion (R. 659, 660).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Edward Lumbard, Jr.,
Granville Whittlesey, Jr.,
Counsel for Respondent.

July 16, 1952.